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Committee of Experts on International Cooperation in Tax Matters
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Summary of expected modifications to the United Nations Model Double Taxation Convention between Developed and Developing Countries and commentaries for the 2017 update: articles 1, 5 and 8, and one general change

Note by the Secretariat

The annexed table contains a summary of issues discussed by the Committee of Experts on International Cooperation in Tax Matters with respect to modifications to articles 1, 5 and 8 of the United Nations Model Double Taxation Convention between Developed and Developing Countries. The table provides information about the work that has already been done and the work that is to be accomplished by the end of June 2017, when the membership of the Committee will change. The column entitled "Status at 14th Session of the Committee" is therefore intended to guide discussion and decision-making during the fourteenth session of the Committee.

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Annex

Summary of expected modifications to the United Nations Model Double Taxation Convention between Developed and Developing Countries and commentaries for the 2017 update: articles 1, 5 and 8, and one general change*

Topic	*9th Session of the Committee*	*10th Session of the Committee*	*11th Session of the Committee*	*12th Session of the Committee*	*13th Session of the Committee*	*Status at 14th Session of the Committee*
Art.1 **1. Hybrid Entities** **(Originally under Art.4)** 2. Base Erosion & Profit Shifting	**1. Hybrid Entities** **(Originally under Art.4)** – Mr. Louie presented E/C.18/2013/CRP.1 – He offered to present a more detailed paper containing a proposal for modification to the UN Model and commentary on Art.4 (and also make reference to other affected articles) http://www.un.org/esa/ffd/wp-content/uploads/2014/09/9STM_CRP1_HybridEntities.pdf **2. Base Erosion & Profit Shifting** Not included in the Agenda	**1. Hybrid Entities** **(Originally under Art.4)** – Mr. Louie presented a paper (E/C.18/2014/CRP.14) containing examples and proposed modifications to Art.1 and its commentary – He was asked to prepare an updated version of his paper to be discussed at 11th session www.un.org/esa/ffd/events/tenth-sessiontax.html **2. Base Erosion & Profit Shifting** Not included in the Agenda	**1. Hybrid Entities** **(Originally under Art.4)** – Mr. Louie presented paper E/C.18/2015/3 – Mr. Louie offered to revise the proposed wording of the commentary on Art.1 before next meeting – The Committee agreed http://www.un.org/ga/search/view_doc.asp?symbol=E/C.18/2015/3 **2. Base Erosion & Profit Shifting** Not included in the Agenda	**1. Hybrid Entities** **(Originally under Art.4)** – CRP.7 EC18/2016 finalized – Language in Annex I of the paper to be added to the Commentary to Article 1 of the UN Model **2. Base Erosion & Profit Shifting** Not included in the Agenda	**1. Hybrid Entities** **(Originally under Art.4)** Hybrid entity issue finalized as per wording agreed at 12th session **2. Base Erosion & Profit Shifting** Possible treaty revision of article 1 along the lines of recent OECD changes. Issue of whether article 1 is the right place for some BEPS related changes discussed. Possible change raised from "Persons Covered' to "Scope" or "General Scope"	**1. Hybrid Entities** **(Originally under Art.4)** Already agreed: Hybrid Entity Issue finalized as per wording agreed at 12th session **2. Base Erosion & Profit Shifting** – For decision: Issue of whether article 1 is the right place for some BEPS related changes discussed. Possible change raised from "Persons Covered' to "Scope" or "General Scope"

* The present annex is being issued without formal editing.

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Art.5 **1. Meaning of "connected projects"** **2. Base Erosion & Profit Shifting**	**1. Meaning of "connected projects"** – Ms. Devillet presented updated paper E/C.18/2013/CRP.2 *"the Committee agreed that the traditional interpretation of the current provision of Art.5(3) (b) of the Model requires physical presence of individuals, being an employee or personnel of the enterprise furnishing services, in the source State in order to constitute a PE in that State.* – *However, some Committee members recognized that the development of the digital economy may create challenges for the application of that provision and that this should be*	**1. Meaning of "connected projects"** – Mr. Dawson presented the paper written by Devillet E/C.18/2014/CRP.11 on: (a) the meaning of the term "the same or a connected project" in article 5 (3) (b) of the Model Convention; and (b) the requirement of physical presence for a permanent establishment to exist. – The Committee agreed to: 1. Include a new para. (para. 12.1) to the commentary on Art.5(3) providing that the traditional interpretation of subpar. (b) would require the physical presence of individuals in the source State, in the form of an employee or	**1. Meaning of "connected projects"** – In addition to 10th session consensus: 1. Recognized the minority view in the Commentary "A minority view was that the requirement of physical presence is no longer relevant for article 5 (3) (b), as the business cycle may be completed without that physical presence. While some of those concerns may be addressed by adopting the article on fees for technical services, such an article does not cover all services covered under article 5 (3) (b)." 2. Decided to include a new para 12.2	**1. Meaning of "connected projects"** Not included in the Agenda **2. Base Erosion & Profit Shifting** A revised commentary to Art 5(3) to deal with contract splitting was agreed (with some additions to be added to deal with some LOB cases). It was agreed to align paragraph 5(7) with the OECD wording, in particular removing the arm's length dealing provision, which made it easier to qualify as an independent agent under the UN as compared with the OECD model. Two options were proposed for an amended paragraph 5. Option 1 was based on the Multilateral	**1. Meaning of "connected projects"** Not included in the Agenda **2. Base Erosion & Profit Shifting** – Possible treaty revision of article 5, paragraphs 3, 4, 5 and 7 based on the OECD changes. – There was consideration of the issue whether to remove the words "(for the same or a connected project)" from subparagraph 5(3) (b) of the Article. The matter was voted on and the majority preferred retaining the wording but with an alternative in the Commentary that omitted the wording, with a balanced commentary on the perceived pros	**1. Meaning of "connected projects"** – Committee Members should approve new language to be included in the new version of the UN Model, as agreed in the 11th Session of the Committee. **Base Erosion & Profit Shifting** – For decision: final wording of BEPS related changes, including alternative wording on same or connected projects and 11th session changes for those retaining the concept.

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	reflected in the commentary. – *Thus, further efforts should be taken to address that issue in the commentary through an alternative provision or alternative provisions."* – Ms. Devillet was asked to develop wording that encapsulated that policy for the next session **2. Base Erosion & Profit Shifting** Not included in the Agenda	personnel of the enterprise furnishing services, in order for a PE to exist in that State. Some Committee Members registered a minority dissenting opinion on this issue 2. Included a new para. 12.2 clarifying that only the profits attributable to the services performed within the source State could be taxable in that State 3. Asked Mr. Dawson to redraft and simplify some other paragraphs proposed to be added to the commentary on Art.5(3), including some examples, with a view to clarifying that reference should be made to the perspective of both the service provider and the customer in determining what	clarifying that only the profits attributable to the services performed within the source State could be taxable in that State 3. Proposed revisions to the commentary on Art.5(3) 4. Proposed to include some examples to clarify that reference should be made to the perspectives of both the service provider and the customer when determining what constitutes "the same or a connected project" 5. The commentary would include some relevant factors for consideration, such as whether the projects are	Instrument wording. Option 2 did not refer to "material modification[s]" A majority preferred Option 1. Many Members noted the importance of the commentary in clarifying what "material modification" means. It was decided to await a commentary before a final decision.	and cons of the two options. It was noted that how the commentary explained the meaning of the formulation was vital, as some considered the former wording clearer and some considered the newer wording clearer.	

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		constitutes "the same or connected project"	provided at the same location, whether they would usually be provided under a single contract, whether the services are provided consecutively, whether the projects resulted from the same bidding or negotiation process, whether each project is capable of separate delivery or acceptance and whether a reasonable person would not have entered into the contract as a separate project			
		4. Some of the source State concerns arising from the digital economy and changes in company practices might be addressed by adopting the forthcoming article on fees for technical services and that the relationship between the provisions of Art.5 dealing with services and those of the article on fees for technical services should be clarified in the commentary.	6. In the proposed para. 12.5, the reference to "associated companies" would be changed to "closely related companies" to			
		http://www.un.org/esa/ffd/wp-content/uploads/2014/10/10STM_CRP11_Art5Project.pdf				
		2. Base Erosion & Profit Shifting				
		Not included in the Agenda				

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			distinguish it from the concept of "associated enterprises" contained in art.9 7. The Committee agreed to use the same definition used in the OECD/G20 BEPS Action 7. **2. Base Erosion & Profit Shifting** Not included in the Agenda			
Art.8 Shipping, inland waterway transport and air transport: **1. Meaning and coverage of the term "auxiliary activities"** **2. Cruise Shipping activities**	**1. Meaning and coverage of the term "auxiliary activities"** Not included in the agenda. **2. Cruise Shipping activities** – Secretariat to update the paper (E/C.18/2013/CRP.4) for 10th session – Discussion over the application of article 8 to cruise	**1. Meaning and coverage of the term "auxiliary activities"** – The Committee considered whether the UN commentary should adopt the same terminology as the OECD (changing "auxiliary activities" to "ancillary activities," to avoid confusion with the term "preparatory and auxiliary	**1. Meaning and coverage of the term "auxiliary activities"** – The issue subjected to discussion here was whether ancillary and auxiliary activities were similar terms. The subcommittee was of the opinion that the terms were equivalent and	**1. Meaning and coverage of the term "auxiliary activities"** Not included in the agenda. **2. Cruise Shipping activities** – The Members were reminded that at the 12th session it was agreed that the potential application of Article 8 to cruise shipping would be	**1. Meaning and coverage of the term "auxiliary activities"** Not included in the agenda. **2. Cruise Shipping activities** Extensive discussions on what constitutes a stop for international transport services. Some members were of the opinion that a fuel stop is not long enough to constitute	**1. Meaning and coverage of the term "auxiliary activities"** Already Agreed: – Model to be changed to substitute the term "auxiliary activities" by "ancillary activities, following the OECD Model, and as per 11th and 12 session outcomes.

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	shipping, set to be an agenda item for the 10th session of the Committee – Mr. Martino offered to provide a paper on the subject	activities") (E/C.18/2014/CRP.1) – Committee decided to create a new subcommittee on possible updates to the commentary on Art.8 of the Model, to cover in particular the concept of "auxiliary activities and the issue of the application of Art.8 to cruise shipping" **2. Cruise Shipping activities** Not included in the agenda.	favored using the term "ancillary activities" as in the OECD model. – Discussion ensued on account of the fact that some members considered "ancillary" to be broader in operation than the term "auxiliary", to the extent that it could create a larger "carve-out" for profits from taxation under the normal principles of articles 5 and 7 and could lead to unjustified loss of revenue for States in which such profit-making activities occur – the Committee requested that the Subcommittee redraft the	acknowledged in the Commentary by including an example appertaining to cruise shipping.	a stop for international traffic purposes, whereas a stop to pick up passengers would. Agreement was reached in principle to only treat as a stop those cases where there was a destination in itself for passengers, not merely a fueling or emergency stop. Exact wording to be cleared at 14th session. The treatment of profits emissions permits, containers and internal traffic was also discussed. Some members were of the opinion that some of these items are not to be included within the scope of article 8. A minority view is to be registered with respect to these subjects. It will also be reflected that some consider internal transport is covered by the current wording of	– Commentary on Article 8 to be modified, providing extensive examples of when the article is applicable. – Minority view regarding the use of the term "ancillary activities" to be registered in the commentary. **2. Cruise Shipping activities** – Amend commentary to clarify that international cruising activities are included within the scope of article 8 and are therefore regarded as international transport services. – Amend commentary to reflect minority views on the

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			proposed commentary on article 8, emphasizing the various and clear examples with regard to when the article should be applicable. – The Committee members opted to follow the OECD Model ("ancillary"), with due note of the minority opinion. **2. Cruise shipping activities** – The Committee accepted in principle the recommendations made by the Subcommittee on the inclusion of cruise shipping activities within the coverage of article 8 and requested it to propose updates to the		the Article, but as a policy choice prefer an option excluding it from coverage.	treatment of emissions permits, containers and internal traffic (wording to be settled). – Committee to propose language to reflect discussion on what constituted a step for international transport purposes. (wording to be settled)

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			commentary accordingly. A minority view, that cruise activities were not within the scope of article 8, would also be noted.			
"Such countries are free to include a provision" and similar wording — relevance to the purely guidance role of the UN Model (See 13th session note)	Not on agenda	Not on agenda	Not on agenda	Not on agenda	It was noted more broadly by the Secretariat, following the comment of a Member, that the common usage in the Model that States not wishing to follow a proposed text were "free" to adopt an alternative wording, was technically correct, but as the same applied whether or not the Model offered alternative wording (with the model having no binding force) it could lead to misunderstandings — "may prefer to" or "may wish to" or similar should therefore replace the term "are free to" in the next version of the Model, wherever	Purely editorial, for secretariat report at most.

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					used. This should not affect direct quotes from the OECD commentary, where that formulation may have more relevance because of a relevant OECD recommendation.	